



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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March 28, 1984

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

National Security Council
Central Intelligence Agency
Department of Defense
Department of State
General Services Administration

SUBJECT: DOJ draft statement on S. 1335, a bill concerning the
FOIA exemption for national security information

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than COB Friday, March 30, 1984.
(NOTE: GSA's draft statement for the hearing scheduled for April 3 was circulated on 3/27/84.)

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

*3-30- Relayed "no objection"
to Branden via telephone
bcb*


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: A. Donahue K. Wilson R. Veeder J. Barie
C. Wirtz

DRAFT

STATEMENT
OF
MARY C. LAWTON
Counsel for Intelligence Policy
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
On
S. 1335 - a bill to amend the
Freedom of Information Act
April 3, 1984

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to appear here today to discuss the Department's views on further amendment to the Freedom of Information Act. It is our understanding that one of the proposals before the Subcommittee is S. 1335 a bill to amend the Freedom of Information Act and, through it, Executive Order 12356. For the reasons I will explain, the Department opposes that bill.

Apart from the specialized provisions concerning restricted data contained in the Atomic Energy Act, provisions relating to the classification of information have always been established by Executive Order. As Chief Executive, Commander-in-Chief and principal instrument of foreign policy, the President has, as the courts have recognized, a responsibility to protect State Secrets. This responsibility has been exercised for many years by establishing a formal system for identifying and categorizing State Secrets, i.e., the classification system. Without going into excessive detail, let me outline the current system.

Executive Order 12356 establishes three basic categories of classification. The categories are based on an assessment of the harm that the disclosure of the information would cause:

- Top Secret - exceptionally grave damage
 to the national security;
- Secret - serious damage to the
 national security;
- Confidential - damage to the national security.

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The Order limits the authority to classify and declassify, with different limits being set for each category of information. It also establishes regulations for the handling of classified information which vary with the classification category.

It is important to note that the Order "defines" the type of information which may be classified not merely by reference to the harm done by disclosure but also by a list of examples of the sort of State Secrets requiring protection. The list is, of necessity, generic in its descriptions but it nevertheless provides rather clear guidance on proper subjects for classification consideration.

Classified information is expressly exempted from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1) if it is "in fact properly classified pursuant to such Executive Order." If a requestor has been denied information on the grounds that it is classified a court may review that denial de novo and the burden is on the government to prove that the information is properly classified under the Executive Order.

This system would be changed by S. 1335. It would limit the FOIA exemption to only those properly classified records which meet two additional tests:

- (1) matters the disclosure of which could reasonably be expected to cause identifiable damage to national security, and
- (2) matters in which the need to protect the information outweighs the public interest in disclosure.

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The bill would also alter the present judicial review standard under FOIA. As noted above, the courts presently review FOIA exemption claims de novo. Under S. 1335 the court would use its own judgment as to whether the damage caused by disclosure is "identifiable" (presumably to the court) and could reasonably be expected (presumably by the court) to cause such damage. However, the court's review as to whether the public interest outweighs the need for protection is apparently confined to deciding whether the agency considered this, not whether the judge would have come to the same conclusion.

While S. 1335 purports to amend FOIA it would have the effect of amending Executive Order 12356 by instructing federal officials administering FOIA that in addition to following the President's directive on classification they must determine that disclosure would cause:

"identifiable" exceptionally grave damage
(Top Secret);

"identifiable" serious damage (Secret); or

"identifiable" damage (Confidential); and,

further, that the need to protect against such damage is not outweighed by "the public interest."

As explained in more detail in our letter to the Committee concerning S. 1335, we believe this proposal raises serious constitutional concerns. The concept of separation of powers is inherent in the constitutional division of governmental

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responsibility into three branches. Certainly that division is not rigid and the Constitution assigns different aspects of some governmental responsibilities to different branches. It is clear, however, that the President is Chief Executive, Commander-in-Chief, and the principal instrument of foreign policy. As such it is his responsibility to protect State Secrets involving the national defense and foreign policy and to instruct his subordinates in this regard. So too, it is the Executive which is empowered to assert the State Secrets privilege in the courts.

Through the device of an amendment to FOIA, S. 1335 attempts to assume these Executive functions, providing conflicting instructions to Executive Branch officials to apply a different classification/declassification criteria to any records requested under FOIA. In our view Congress cannot attempt to control the President's decisions with respect to whether particular information needs to be protected in the interest of national security and cannot decree by statute what specific items of diplomatic or intelligence information may merit classification in particular circumstances.

This conflicting "instruction" presents practical problems as well. Those conducting declassification reviews in FOIA matters would be applying different standards from officials making classification decisions. This will add an unacceptable

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level of uncertainty to the classification process. Moreover, adding two additional tests to the first FOIA exemption will necessitate even more detailed affidavits explaining the basis for the exemption, increasing both the risk of disclosure and the burden on the Executive Branch and the courts. After years of familiarity with a single standard of judicial review under FOIA, courts would be obliged to shift to a bifurcated standard in cases involving exemption 1 material. Yet if the experience of the past is a basis for prediction of the future, the net result is likely to be more, and more prolonged, litigation, at greater expense, disclosing little or no additional information.

For these reasons the Department of Justice opposes enactment of S. 1335. In our view, information properly classified pursuant to Executive Order should be exempt from disclosure under FOIA. The current language of exemption 1 provides precisely that and we cannot support any proposal restricting that exemption.